Supreme Court, U.S.
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No. 80-565

In the Supreme Court of the United States

October Term, 1980

AMELIA FLOHR HEYL, As Personal Representative of the Estate of Nancy Zimmerman, Deceased, and As Guardian of Kim Ann Zimmerman and Lisa Marie Zimmerman, Minors,
Petitioner/Plaintiff,

vs.

CARNIVAL CRUISE LINES, INC.,
Respondent/Defendant.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE AND FACTS

Please refer to the Statement in the Petition for Certiorari.

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 22 (5), Petitioner submits this Reply Brief addressed to arguments first raised in Respondent's Brief in Opposition.

I.

Respondent argues that actual diversity of citizenship has never been established, so there is no proper record for this Court to determine whether Petitioner/Plaintiff could have brought the suit in diversity rather than in admiralty. It should be noted, however, that the trial court denied Plaintiff's requested amendment to the Complaint for only one reason; the Court was of the opinion that the requested amendment, even if granted, would be futile since Plaintiff would still not be entitled to a trial by jury because the death occurred on the high seas. The Fifth Circuit Court of Appeals agreed.

It has never been disputed, and Respondent still does not dispute, that there is, in fact, complete diversity of citizenship between Petitioner/Plaintiff and Respondent/Defendant. The issue in this case has always been simply whether the requested amendment to the Complaint would be futile.

The trial court mentioned for the first time in its order denying a new trial that Plaintiff's proposed amendment to the Complaint only alleged "residency" of the parties rather than "citizenship." We acknowledge that,

in this respect, the proposed amendment was technically defective in that "citizenship" rather than "residency" should have been alleged and the proposed amendment should have specified the Defendant's particular place of incorporation rather than merely allege Defendant to be a foreign corporation. *DeLome v Union Barge Line Co.*, 444 F.2d 225 (5th Cir. 1971); *McGovern v American Airlines, Inc.*, 511 F.2d 653 (5th Cir. 1975). However, until the trial court mentioned this in its order denying a new trial Plaintiff was not on notice of this technical defect. Neither the Defendant nor the trial court noticed this technical defect until after the non-jury trial when the Motion for New Trial was being considered. If put on notice earlier Plaintiff would certainly have cured this minor problem as it would have been a very simple matter to do so.

It is well settled that a Complaint which fails to properly aver "citizenship" can be easily cured by amendment and the courts should liberally allow the opportunity to do so, both at the trial and appellate level; especially when Plaintiff was not previously on notice of the defect. 28 USC §1653; *McGovern*, supra; *Howard v DeCordova*, 177 US 609, 20 S.Ct. 817 (1900); *Burnstein v Columbia Broadcasting System, Inc.*, 291 F.2d 8 (7th Cir. 1961); *Texaco-Cities Service Pipe Line Co. v Aetna Cas. & Sur. Co.*, 283 F.2d 144 (8th Cir. 1960); *Mantin v Broadcast Music, Inc.*, 244 F.2d 204 (9th Cir. 1957); *Molnar v Nat'l. Broadcasting Co.*, 231 F.2d 684 (9th Cir. 1956); *Shriner v Strong*, 229 F.Supp. 71 (N.D. Ill. 1964); *Kelly v Kentucky Oak Mining Co., Inc.*, 491 F.2d 318 (6th Cir. 1974); *Hunt v Penn Central Transp. Co.*, 414 F.Supp. 1157 (W.D. Pa. 1976).

Often an amendment is not even necessary if the record on the whole establishes the existence of the re-

quired diversity of citizenship between the parties. *Nat'l. Farmers Union Property & Cas. Co. v Fisher,* 284 F.2d 421 (8th Cir. 1960); *Baer v United Services Auto Ass'n.,* 503 F.2d 393 (2d Cir. 1974); *Smith v Dealers Transit, Inc.,* 239 F.Supp. 605 (E.D. Tenn. 1965).

Here, the record reflects that the deceased resided in Texas since 1974 until her death in 1977 and was employed at a Texas bank since 1975. (R. 107, 110, 212).[1] She was in fact a Texas citizen and her estate is being probated in Texas. The Plaintiff, Amelia Flohr Heyl, is the natural mother of the deceased and a personal representative of the estate. (R. 39). The record establishes that Amelia Flohr Heyl and her husband, Bert Heyl, are residents of Texas. (R. 222). On remand Plaintiff would prove she is also a "citizen" of Texas. Defendant is aware of this since it has copies of all documents appointing Mrs. Heyl personal representative in Texas (R. 38) and it even took Bert Heyl's deposition in Texas. (R. 61). If necessary Petitioner could supplement the record to include Mrs. Heyl's deposition or trial testimony which would possibly reveal further that she is a Texas citizen. However, this does not seem necessary in order to remand this cause for further proceedings on a diversity theory since Plaintiff would then be put to this burden of proof anyway.

It would only destroy diversity if Defendant corporation was a Texas citizen. Defendant admitted in its answer (R. 28) that it is a foreign corporation doing business in Florida, with a business office in Miami, Florida. Plaintiff has alleged that Defendant's principal place of business

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1. The original record on appeal has been certified and transmitted to this Court. Accordingly, Petitioner will herein cite directly to the record rather than supplementing this brief with another Appendix.

is in Miami, Florida. This would make Defendant a Florida citizen for diversity purposes. 28 USC §1332 (c). Defendant is also a citizen of any state in which it has been incorporated. The record does not now reflect where Defendant was incorporated because Plaintiff was not permitted to allege diversity of citizenship jurisdiction by amendment to the Complaint. It would only destroy diversity if Defendant was incorporated in Texas. If this was the case Defendant would surely have opposed Plaintiff's requested amendment to the Complaint by simply stating that Defendant was a Texas corporation. Defendant did not and could not do this because Defendant, in fact, was not a Texas corporation.

Respondent also correctly argues that in a wrongful death diversity case such as this it is the citizenship of the personal representative of the estate, and not the citizenship of the decedent, that is relevant for purposes of establishing diversity. Respondent then correctly points out that the proposed amendment to the Complaint alleges the residence of the deceased rather than the citizenship of the personal representative. This was a defect which was not observed by anyone at the trial level. We admit this is another technical defect in our proposed amendment; however, this defect is also easily curable as is the other defect mentioned by the trial court for the first time in its order denying a new trial. If the only problem at the trial level were such technical defects as these the trial court would surely have allowed the defects to be cured by proper allegations, but this was not the problem that concerned the trial court or the Fifth Circuit. The trial court specifically stated that even if diversity was properly alleged the Motion to Amend the Complaint would still have been denied because of the Court's belief that Plaintiff's exclusive remedy was in admiralty; and the Fifth Circuit agreed.

The record does establish at least a probability of diversity of citizenship. Petitioner would request leave to cure the technical defect by amending the allegations to state that Plaintiff is a citizen of Texas as was Plaintiff's decedent, and Defendant is a corporation, a citizen of and incorporated only in Panama and Connecticut (not in Texas) at the time the Complaint was filed and has its principal place of business in Miami, Florida. Since the technical defect was not noticed by anyone until after trial was completed, this is an appropriate case to allow leave to amend, upon remand to the trial court, to cure the defect. It is "contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v Davis,* 371 US 178, 83 S.Ct. 227 (1962). This Court has the power to remand and direct the trial court to allow Plaintiff to amend its complaint to correct a defective allegation of jurisdiction. 28 USC §1653. Leave to amend defective allegations of subject matter jurisdiction should be freely given even after judgment has been entered or an appeal taken. *Eklund v More,* 410 F.2d 731 (5th Cir. 1969); *John M. Peters Const. Co. v Marmar Corp.,* 329 F.2d 421 (6th Cir. 1964).

Respondent argues that the record does not prove that diversity of citizenship actually exists in this case. However, this is only because the trial court did not allow Plaintiff to amend its Complaint to allege diversity jurisdiction, therefore the issue was not listed in pretrial stipulation since it was not an issue for trial. It was not an issue for trial because of the Court's order which limited Plaintiff to admiralty jurisdiction under D.O.H.S.A., therefore it would have been irrelevant for Plaintiff to prove diversity of citizenship at trial.

It should be apparent that the reason the record does not prove actual diversity is because the trial court refused to allow Plaintiff to even allege diversity jurisdiction, and that is now the issue. Respondent's argument seems to be putting the cart before the horse; the allegations must come first and then the supporting evidence. On remand with instructions to allow Plaintiff to proceed strictly on a diversity theory of jurisdiction, Defendant would be entitled to a dismissal of the Amended Complaint if Plaintiff could not support the allegations of diversity of citizenship with any evidence. Once again, Defendant does not even now deny that diversity does in fact exist; Defendant only argues that the record does not prove it but this is because Plaintiff was not even permitted to allege it. As a practical matter it would be curious indeed for Plaintiff to incur the expense of appealing to the Fifth Circuit and petitioning this Honorable Court for certiorari if Plaintiff could not prove on remand that diversity of citizenship actually exists.

II.

Respondent argues that Petitioner has waived the issue of diversity jurisdiction because the pretrial stipulation stated admiralty as the sole basis of federal jurisdiction. Respondent has presented this argument previously to both the trial court and the Fifth Circuit as a reason for not reaching the merits, and neither Court was persuaded.

A review of the proceedings in this case demonstrates clearly that Plaintiff never voluntarily waived the issue regarding the right to trial by jury and did everything reasonably possible to present the issue to the trial court, on more than one occasion, and thus preserve the issue for appeal.

In the original Complaint Plaintiff demanded trial by jury (R. 4) and jury trial was initially scheduled (R. 42) until Defendant objected. (R. 46-48). Plaintiff then responded (R. 78) and moved to change the basis of federal jurisdiction to diversity of citizenship in order to receive a jury trial. (R. 79-81). The controversy was then at issue and was briefed by both parties.

The trial court denied Plaintiff's Motion to Amend and rescheduled the case for a non-jury trial. (R. 90-91). This order was entered February 8, 1979, and the Court specifically stated, "Plaintiff's exclusive remedy is under the Death on the High Seas Act." No suggestion was made to raise the issue again for reconsideration.

The pretrial stipulation was filed on March 8, 1979. (R. 210). This was one month after the February 8 order (R. 90-91) which specifically instructed Plaintiff that her exclusive remedy and basis for federal jurisdiction was D.O.H.S.A. and she could *not* base jurisdiction on diversity. Therefore, Plaintiff had no other choice at that time but to accept the court's ruling and indicate on the pretrial stipulation that the basis of jurisdiction was in admiralty under D.O.H.S.A. (R. 210). What else was the Plaintiff to do?

Defendant now considers this a voluntary waiver of the entire issue but it clearly was not. Defendant now implies that Plaintiff should have continued to rely on diversity jurisdiction in the pretrial stipulation, even at the cost of antagonizing the trial judge who had just a few weeks earlier ordered the Plaintiff that she could *not* rely on diversity, in order to preserve this issue for appeal. Of course if Plaintiff did this the Defendant would have quickly pointed out to the trial Judge that Plaintiff was refusing to abide by the Court's order. (For example, see R. 255).

Everyone was aware that Plaintiff had not abandoned her desire for trial by jury. Even at the pretrial conference Plaintiff again orally moved to amend the Complaint so she could obtain a jury trial and the Court ordered Defendant to respond. Defendant filed a written response to Plaintiff's renewed Motion (R. 255-257) which argued that Plaintiff waived the issue in the pretrial stipulation. The trial court was aware that Plaintiff never intended to abandon the issue by framing the pretrial stipulation in accordance with the Court's February 8 order. Therefore, the Court did not deny Plaintiff's renewed Motion on the basis that the issue was waived by pretrial stipulation, indeed the Court did not even address this argument. (But see R. 263 where the Court accepted this waiver argument on another unrelated issue.) The Court denied Plaintiff's renewed Motion *on its merits*. (R. 261-262).

After trial and an unfavorable memorandum opinion written by the Court Plaintiff timely moved for a new trial and again argued that the Court erred by refusing to allow Plaintiff to amend its Complaint to allege only diversity jurisdiction and erred by denying a trial by jury. (R. 450-458). Defendant filed a memorandum in opposition (R. 459-462) which abandoned their "waiver" argument because by now it was clear the trial court would reject this argument. The Defendant's memorandum argued the merits and the Court's order denying a new trial (Supp. R) went to the merits and was based on the Court's belief that Plaintiff could only proceed in admiralty under D.O.H.S.A.

Plaintiff has done everything reasonably possible to preserve this issue for review and yet abide by the trial court's orders when the case was still at the trial level. According to Defendant's reasoning, Plaintiff would have to

ignore the trial court's February 8 order and belabor the issue in the pretrial stipulation (which is supposed to narrow the issues for trial) in order to preserve the question for appellate review. Defendant has not cited a single case which states that a party in a pretrial stipulation must continue to belabor an issue which has already been ruled upon by the Court or else be deemed to have waived his right to appeal from the adverse pretrial order.

A pretrial stipulation is drafted with a view as to what the proof will be at trial and the pretrial order permits the parties and the Court to prepare for trial knowing what issues they must be ready to meet; thus, the failure to include in the pretrial order an issue which remains to be resolved at trial may preclude the offer of proof at trial on that issue, but it is not a waiver for all purposes. *Pacific Indemnity Co. v Broward County*, 465 F.2d 99 (5th Cir. 1972).

Here it was already known that there would be no reason to prove diversity of citizenship at trial because the Court had already ruled that Plaintiff could not proceed on that theory of jurisdiction. Thus, there was no reason to include it in the pretrial stipulation as an issue which remains to be resolved at trial, however, this certainly does not waive the issue for purposes of appeal. To accept Defendant's argument that a party must include in the pretrial stipulation all issues already ruled upon in order to preserve them for appellate review would defeat the usefulness of the pretrial order as a device to reduce and narrow the issues for trial. Cf. *Pacific Indemnity Co.*, supra.

Moreover, Fed. R. Civ. P. 16 states that the Court shall make an *order* regarding the action taken at pretrial conference and such an *order, when entered,* controls the

subsequent course of the action unless modified. Here there was no *order* which adopted the parties' pretrial stipulation and Rule 16 does not say that pretrial stipulations alone, without a court order approving the same, control the subsequent course of action unless modified.

Based on the foregoing, the Respondent's argument that the issue presented to this Court has been waived or is not properly preserved by the record is without merit and has not persuaded any of the previous Judges that have considered this case.

III.

Respondent states (at pages 2 and 10 of its Brief in Opposition) that Plaintiff stipulated in the pretrial stipulation that the alleged negligent conduct occurred on the high seas, and Respondent cites R. 210. This is a misreading of the pretrial stipulation. Plaintiff has always agreed that the alleged negligent acts of the ship physician and nurse occurred on the high seas. The stipulation at R. 210 that the tortious conduct occurred on the high seas should be read in conjunction with paragraph I on R. 210 to mean that the medical malpractice of the physician occurred on the high seas. But this was not the only issue for trial. The pretrial stipulation also states at R. 213 that other issues of fact for trial were whether Defendant was directly negligent in hiring the ship physician and equipping the ship with inadequate medical facilities and personnel. Clearly the acts giving rise to vicarious liability occurred on the high seas but the acts giving rise to direct liability did not.

IV.

Respondent, at page 12 of its Brief in Opposition, states that Petitioner does not invoke any particular state

wrongful death remedy and therefore admiralty is the only remedy available since there is no other substantive law to apply in a State Court which could be removed to Federal Court on diversity jurisdiction.

This case has never yet reached the stage where we have to determine exactly what substantive law the Federal District Court would apply on diversity of citizenship jurisdiction. This issue is not now before this Court since the trial court denied the proposed amendment to the Complaint on the sole ground that Plaintiff's exclusive remedy must be sought in a Federal Admiralty Court under D.O.H.S.A. because D.O.H.S.A. preempts all other remedies (even assuming there would otherwise be another viable remedy). This, then, is the only issue for this Court to consider.

Speaking academically, it would seem that D.O.H.S.A. was not intended to preempt remedies under State Wrongful Death Statutes. See 46 USC §767; *Safir v Compagnie Generale Transatlantique,* 241 F.Supp. 501 (E.D. N.Y. 1965) and cases cited therein; *Sierra v Pan American World Airways,* 107 F.Supp. 519 (D. Pr. 1952); *Ledet v United Aircraft Corp.,* 10 N.Y.2d 258, 219 N.Y.S.2d 245, 176 N.E.2d 820 (1961). See also *Just v Chambers,* 312 US 383, 61 S.Ct. 687 (1941). In a diversity of citizenship case in Federal District Court for the Southern District of Florida, the federal court, under the Erie Doctrine, would apply the substantive law of the forum state which would necessitate an inquiry into Florida's choice of law doctrine. See *Klaxton Co. v Stentor Mfg. Co.,* 313 US 487, 61 S.Ct. 1020 (1941); *Westerman v Sears, Roebuck & Co.,* 577 F.2d 873 (5th Cir. 1978). Just a few weeks ago the Florida Supreme Court discarded the previously recognized lex loci delicti doctrine in favor of the more flexible "significant relationships" test to determine choice of law. *Bishop*

v Fla. Speciality Paint Co., ... So.2d ..... (Fla. Sup. Ct. Case No. 58,372, opinion filed October 23, 1980). There is not yet any Florida case law under this new approach and it is possible a Florida Court (and thus the Federal District Court) would apply Florida law, or Texas law, or perhaps the substantive law of some other jurisdiction which has a more significant relationship such as the "law of the flag," or possibly even general maritime law or the *substantive* law under D.O.H.S.A. (in which case it would only be the *substantive* law under D.O.H.S.A. while the *procedure* would still be the civil procedure applicable to diversity of citizenship cases, rather than admiralty procedure. See *Safir*, supra; *Sierra*, supra; *Ledet*, supra).

There are a number of possibilities, however, the important point is that this question has not yet been considered by the lower courts in the present case and therefore it would not seem appropriate for this Court's consideration since any opinion at this stage would be merely an advisory opinion.

CONCLUSION

This Honorable Court should issue its discretionary Writ of Certiorari and order the parties to file briefs on the merits for plenary consideration. Alternatively, since neither party in this case could resist the temptation to argue the merits in these jurisdictional briefs, this case seems to be ready for plenary consideration at this point without the need for supplemental briefs on the merits. Since the original Record on Appeal has already been certified and transmitted to this Court, this Court already has full access to our respective positions on the merits by virtue of our jurisdictional briefs supplemented by our

briefs filed with the Fifth Circuit Court of Appeals. This perhaps would be more expeditious and less expensive.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that three copies of the foregoing Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served by First Class U.S. Mail on all parties required to be served, to-wit: CHRISTIAN KEEDY, ESQ., Smathers and Thompson, Counsel for Respondent Carnival Cruise Lines, Inc., 1301 Alfred I. duPont Building, Miami, Florida 33131, this 20th day of November, 1980.

A. WARD WAGNER, JR.
RICHARD A. KUPFER